BLANK

PAGE

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1028

LOUIS LESSER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE

Subsequent to this Court's denial of the petition for a writ of certiorari on May 2, 1966, petitioners submitted a motion for an order to show cause why this case should not be remanded to the Tax Court for a finding of the useful life of the Helipot Building as remodeled.

In support of this motion, petitioners reiterate the argument set forth in their petition for certiorari that the Tax Court erroneously based its determination of the useful life of the Helipot Building on the building as acquired and not as remodeled (Pet. 10). As pointed out in our memorandum in opposition to certiorari, however, while the Tax Court may have found that the building as acquired had a life of 45 years, it is also clear that the Tax Court rejected petitioners' argument that the remodeling in any way shortened

219-372—66

the useful life of the building; the 45-year life accordingly was also applicable to the building as remodeled (Memo Op. 4).

Petitioners now claim that a recently issued ruling of the Internal Revenue Service, Rev. Rul. 66–111, I.R.B. 1966–19, p. 6 (a copy of which is attached hereto), conflicts with the government's position in the instant case. We disagree. The Ruling merely states that, when a taxpayer acquires a used building, he must depreciate it as a single asset, and that he may not elect to depreciate separately its component parts, such as ceilings, floors, etc. Accordingly, nothing in the Revenue Ruling is inconsistent with the lower courts' decisions in this case or with the position taken in our memorandum in opposition to certiorari.

In view of the foregoing, the denial of the petition for certiorari was correct, and there is no justification for the further action which petitioners request in their motion.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
GILBERT E. ANDREWS,
MARK S. ROTHMAN,
Attorneys.

JUNE 1966.

APPENDIX

Rev. Rul. 66–111:

> The basis of used real property such as a building ordinarily cannot be allocated into separate component accounts for the purpose of determining a composite life in computing depreciation allowances, but an overall useful life for the building must be determined on the basis of the building as a whole.

Advise has been requested whether the cost of used real property, mainly buildings, may be allocated to separate component units for the purpose of accounting for depreciable property under section 1.167(a)–7 of the Income Tax Regulations.

In the instant case, the taxpayer acquired an existing apartment building and land for a lump sum consideration. That part of the purchase price representing land value was allocated on the basis of recent sales of similar lands located in the general vicinity of the subject propery. The taxpayer allocated that part of the purchase price representing investment in the apartment building to various component units, some of which would normally have a shorter useful life than the building as a whole. The allocation of the taxpayer's basis in the building was made in proportion to the relative construction costs of the components as determined by the original owner.

In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land, the basis for depreciation cannot exceed an amount which bears the same proportion to the lump sum as the value of the depreciable property

at the time of acquisition bears to the value of the entire property at that time. Section 1.167(a)–5 of the regulations.

Depreciable property may be accounted for by treating each individual item as an account, or by combining two or more assets in a single account. Assets may be grouped in an account in a variety of ways. Section 1.167(a)–7 of the regulations.

In the case of new property where the taxpayer is the first user, the actual costs of the separate components are generally known and where such costs have been allocated to component groups by personnel competent in design, construction and auditing procedures, and complete and accurate property ledgers are maintained, properly allocated costs may be used by the original owner as a basis for depreciating the components separately, using an appropriate rate of depreciation for each of the separate components.

In the case of *Herbert Shainberg, et ux.* v. *Commissioner,* 33 T.C. 241 (1959), acquiescence, C.B. 1960–1, 5, the Tax Court of the United States permitted the taxpayer to allocate the actual costs of construction of new buildings in his shopping center into separate component group accounts, such as "structures," "wiring," "plumbing," "roof," "ceiling," and "flooring," for depreciation purposes.

When a used building is acquired for a lump-sum consideration, separate components are not bought; a unified structure is purchased. The individual components of a used building are not sold separately and hence are not ordinarily subject to fair market value determinations for allocation of basis or for depreciation purposes. The value of components (ceilings, floors, electrical systems, etc.) of a used building cannot be separated from the value of the building as a whole since their values exist only in connection with

the building as a whole. The original components in a new building bear a direct and known relationship to one another and to the total building cost; however, differing rates of depreciation for the components tend to distort this relationship with time. As a consequence, the new owners of a used building would not normally place the same relative values on components as the original known construction costs. Realistically, this difference in values is academic since the buyer and seller must only agree on an overall price for the unified structure.

In the case of *Louis Lesser and Jeanne Lesser, et al.*, v. *Commissioner*, 352 F. (2d) 789 (1965), the U.S. Court of Appeals for the Ninth Circuit, affirming the Tax Court, 42 T.C. 688 (1964), refused to accept as valid a composite rate for the useful life of a used building based on useful lives of its various components. The Court of Appeals stated: "The Tax Court found: 'The matter * * * is not susceptible of any precise mathematical solution.' We agree."

Accordingly, the basis of used real property, such as a building, ordinarily cannot be allocated into separate component accounts for the purpose of determining a composite life in computing depreciation allowances but an overall useful life for the building must be determined on the basis of the building as a whole.

U.S. GOVERNMENT PRINTING OFFICE:1966

END